IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JODIE DEREK GRAGG, Appellant.	No. 32776-7-II / 33542-5-II UNPUBLISHED OPINION

Penoyar, J. – Jodie Derek Gragg appeals his gross misdemeanor convictions of reckless driving and one count of first degree driving while license suspended or revoked. In his direct appeal, statement of additional grounds for review (SAG),[1] and a consolidated personal restraint petition (PRP), Gragg challenges the trial court's denial of his CrR 3.5 suppression motion, the sufficiency of the evidence, and the adequacy of his representation. He also argues that the prosecutor committed misconduct and cumulative error. We affirm.

FACTS

I. Background

On August 9, 2004, Deputy Brad Johansson observed a person he believed to be Gragg

[1] RAP 10.10.

driving towards him in a white pickup truck. Knowing that Gragg's license was suspended, Johansson attempted to stop the truck. The truck did not stop and drove away erratically across a gravel bar. Johansson's vehicle got stuck, but he continued to pursue the truck on foot. The driver of the truck had fled by the time Johansson found the truck further down the gravel bar. On August 19, Johansson and two other officers located and arrested Gragg, apparently on an outstanding arrest warrant not related to the August 9 incident. He was arrested at a local motel room he was sharing with his girlfriend Patricia Johnson.

After his arrest, Gragg allegedly admitted to Johansson that he was driving the truck on August 9. The State subsequently charged Gragg with attempting to elude a pursing police vehicle and first degree driving while license suspended; it later amended the charges to reckless driving and first degree driving while license suspended or revoked.

II. Suppression Motion

Prior to trial, Gragg moved to suppress the statements he made to Johansson following his August 19 arrest, asserting that he had not been advised of his *Miranda*[2] rights and that his arrest was unlawful.[3] Johansson, Gragg, and Johnson testified at the suppression hearing.

According to Johansson, on August 19, he and two other officers went to a local motel to arrest Gragg on a "confirmed warrant for his arrest out of the Sheriff's Office." RP(12/20/2004) at 4. One of the other officers, Officer Lundstrom, knocked on the door a couple of times

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[3] At the time of the motion hearing, defense counsel, who had only recently been appointed, had not submitted briefing on the arrest issue. *See* RP(12/20/2004) at 2-3. Although he informed the trial court that he intended to introduce evidence related to the validity of the arrest, he did not specify what issues he planned to raise, and he asked the trial court to reserve ruling on the arrest issue until he had time to submit briefing on the issue. RP(12/20/2004) at 3.

without specifically identifying himself as a police officer. When Johnson eventually opened the door, Lundstrom asked her if Gragg was there, told her that they wanted to talk to him, and asked if they could come in to look for him.

Johnson told the officers that Gragg was not there and that they could not come in but could look from where they were standing. Johansson then stepped into the doorway, told Johnson they had a warrant for Gragg's arrest, and asked if they could come in. Johnson stepped aside and, interpreting this as an invitation to enter, the officers entered the motel room where they found Gragg in the shower. The officers arrested Gragg on the outstanding warrant and placed him in Johansson's patrol car after allowing him to dress. Johansson told Gragg he was arresting him on a warrant, but he did not show Gragg a copy of the warrant until Gragg was being booked.

Once Gragg was in the patrol car, Johansson advised him of his *Miranda* rights. Gragg verbally stated that he understood his rights. During the drive to the jail, Gragg initially denied knowing anything about the August 9 incident.

A short while later, Gragg asked Johansson whether he could get a "Get out of jail free card," apparently offering Johansson information in exchange for leniency. RP(12/20/2004) at 20. When Johansson told Gragg that it would depend on his credibility and that his credibility would depend on whether he was honest about the August 9 incident, Gragg admitted that he had been driving the truck. Gragg also stated that he would deny this admission in court and refused to provide written statement.[4]

[4] In addition to testifying about the circumstances of the arrest, Johansson also testified he believed that at the time of the arrest he had probable cause to arrest Gragg for felony eluding on August 9, because Gragg had been seen driving the same truck two weeks before the eluding incident and an eye witness identified Gragg as the driver on August 9. However, Johansson

In contrast, Gragg denied making any admissions to Johansson, being advised of his *Miranda* rights, being told that he was being arrested on a warrant not related to the August 9 incident, or being shown a copy of a warrant at any time. Additionally, although Gragg admitted asking Johansson "if [he] could get a 'Get Out of Jail Free' card like a couple guys [he] kn[e]w," he denied attempting to establish his credibility by admitting to the August 9 incident. RP(12/20/2004) at 20.

Johnson's version of Gragg's arrest also differed from Johansson's. In contrast to Johansson's testimony, she asserted that although she saw the uniformed officers when she opened the door, they did not identify themselves as law enforcement officers. The officers told her only that they were "there to pick up Jodie Gragg" and did not mention they had an arrest warrant. RP (12/20/2004) at 26. She never gave them permission to enter and did not step aside to allow them in. The officers pushed the door open and entered despite her continued objections.

After presenting the evidence, the parties briefly argued the *Miranda* issue, but they did not address the validity of the arrest because defense counsel planned to submit additional briefing on the matter. The trial court reserved its ruling pending receipt of the additional briefing.

Court records show that a "memorandum re arrest" was filed on December 21, and that a supplemental memorandum on the same topic was filed on December 22. Gragg has not included these documents in the clerk's papers on appeal. He has, however, attached what appears to be an unsigned copy of his counsel's December 21 motion to his SAG and PRP. In that document, defense counsel argued that the officers (1) failed to comply with RCW 10.31.040; (2) failed to

admitted that there was no warrant on the eluding charge when he arrested Gragg.

comply with RCW 10.31.030[5]; (3) entered the motel room without Johnson's permission or consent; and (4) failed to comply with RCW 10.31.030 by failing to inform Gragg they were acting under the authority of a warrant and by failing to show Gragg the warrant as soon as possible.

In a December 22 letter, the trial court denied Gragg's suppression motion. After Gragg brought this appeal, we ordered the trial court to enter written findings of fact and conclusions of law. The trial court complied, entering the following findings of fact and conclusions of law:

> UNDISPUTED FACTS
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> 1.
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> On August 19, 2004, officers of the Hoquiam Police Department and Deputy Brad Johansson of the Grays Harbor County Sheriff's Office went to the Sandstone Motel in Hoquiam, Washington, intending to arrest Jodie Gragg. On scene, Officer Lundstrom knocked on the door of Room 106. The knock was answered by Patricia Johnson. The officers asked her if Jodie Gragg was there.
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> 2.
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> After a brief conversation, the officers entered the motel room, and Deputy Johansson located Jodie Gragg in the bathroom. Jodie Gragg was arrested, put into handcuffs, and placed in Deputy Johansson's patrol car.
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> 3.
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> Inside the patrol car, Johansson and Jodie Gragg had a conversation.
>
> DISPUTED FACTS
>
> 1.
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> Whether or not the officers that arrested Jodie Gragg had or were aware of a valid arrest warrant at the time of the arrest.
>
> 2.
>
> Whether or not the officers that entered the motel room had permission to enter the room in order to search for Mr. Gragg.

[5] Although defense counsel cited to RCW 10.31.040 in this argument, it appears that this was a scrivener's error. Gragg does not raise any issues related to RCW 10.31.030 on appeal.

3.

Whether or not Mr. Gragg was properly advised of his *Miranda* rights prior to questioning and whether or not Mr. Gragg knowingly, intelligently waived those rights.

RESOLUTION OF DISPUTED FACTS

The Court finds the testimony of Deputy Johansson to be creditable. Prior to the arrest of Mr. Gragg, law enforcement was aware of a warrant for his arrest and his probable location. Upon knocking at the motel where he was staying; informing Patricia Johnson of the existence of a warrant and ascertaining that Mr. Gragg was on the premises, the officer in question gained lawful entry by permission of one of the tenants. Mr. Gragg's presence was noted, he was arrested and subsequently made voluntary statements following warnings of his *Miranda* rights.

Based upon the foregoing findings of fact, the court enters the following:

CONCLUSIONS OF LAW

1.

The court has jurisdiction over the parties and subject matter herein.

2.

The entry into the motel room where Mr. Gragg was staying was lawful.

3.

The arrest of Mr. Gragg on August 19, 2004, was lawful.

4.

Before questioning, the officer advised Mr. Gragg of his constitutional right as required by *Arizona v. Miranda*.

5.

Before answering any questions, Mr. Gragg knowingly and intelligently waived these rights.

CP 34-36.[6]

[6] Gragg does not argue that the late entry of these findings of fact and conclusions of law was prejudicial or that the findings and conclusions were tailored to address the issues presented on appeal. *State v. Byrd*, 83 Wn. App. 509, 512, 922 P.2d 168 (1996) (trial court's late entry of written findings and conclusions after a CrR 3.6 hearing may warrant reversal of a conviction if an appellant can show prejudice from the delay or that the written findings were tailored to meet the

III. Trial

At trial, Gragg argued mistaken identity and presented an alibi defense.

Johansson testified that on August 3, 2004, he had contacted Gragg and that he was driving a 1979 Ford pickup at that time. He also learned from the Department of Licensing that Gragg's license was suspended or revoked in the first degree.[7] At that time, the truck Gragg was driving was painted with gray primer; Gragg was also wearing a baseball hat.

Six days later, on August 9, Johansson observed a white 1979 Ford pickup heading towards him on State Route 12. Although the truck was now white, Johansson believed it was the same truck Gragg had been driving on August 3, because the license plate number was familiar, the truck "had a small lift in it," and it had easily recognizable tires and wheels. RP(1/4/2005) at 28. He also believed the driver was Gragg even though he could only see that the driver was wearing a baseball hat with "long wispy hair" hanging out the back. RP(1/4/2005) at 16.

Johansson followed the truck down a private road. Knowing that Gragg did not have a license, Johansson activated his emergency lights, sounded his air horn, and attempted to stop the truck. When the truck did not stop, Johansson activated his siren. The truck continued down the private road, passing a vehicle driven by Larry Hake. The truck then accelerated toward the nearby riverbank; Johansson followed.

The truck drove down a steep embankment and onto a gravel bar. When he realized how

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issues presented on appeal).

[7] The trial court had previously granted a defense motion that prohibited Johansson from testifying about the exact nature of this earlier contact with Gragg.

deep the gravel bar was, Johansson stopped his patrol car on the embankment and attempted to back up, but the patrol car got stuck. Johansson got out of his car and ran after the truck.

Johansson found the truck, but the driver was gone. Johansson later confirmed this was the same vehicle he had seen Gragg driving on August 3. He also found Gragg's license and social security card[8] and the driver's hat in the truck.

Johansson further testified that Hake returned to the area a short time later and confirmed that Gragg was driving the truck.[9] Johansson then testified about Gragg's August 19 admission.

On cross-examination, Johansson testified that Gragg was not the truck's registered owner. The impound record noted that the registered owner was Alvin Nelson.

Defense counsel also questioned Johansson about his August 19 conversation with Gragg. At one point, the questioning turned to the issue of Gragg's alleged request for leniency; the following discussion ensued:

> Q [Defense Counsel] Did you make any indication that you would at least attempt for leniency if he talked with you?
> A [Johansson] He wanted to know -- do you want to know the conversation before that? That's up to you.
> Q As far as on this particular charge, did you tell him that you would talk to the prosecutor at all?
> A He was inquiring if he would give me some drug information, if I would possibly help him on these charges. And I said -- that's basically how I came to the credibility part. I said if you went to work as a [sic] informant for the drug task force you have got to be able to tell the truth. They won't use you because we have to have credible witnesses to use for informants so if he wanted to work for the drug task force he had to at least tell the truth on this matter before they would even talk to him, and that's all I said.

[8] Johansson did not seize the license or social security card and was unable to produce these items at trial.

[9] Hake also testified. Although he admitted signing a statement drafted by Johansson, he denied reading it and claimed that the statement the trial court admitted did not appear to be the one he signed. He also denied telling Johansson that he could positively identify Gragg as the driver of the truck and contradicted many of Johansson's statements regarding their contact.

RP(1/4/2005) at 43-44.

Following this testimony, Gragg's friend Donald Erickson, Johnson, and Gragg testified that although Gragg had been at Alvin Nelson's house the morning of August 9, Gragg spent most of the day working on cars with Erickson. Gragg testified that he had never driven a Ford F 150 truck, that he did not drive to the gravel bar on August 9, that he did not know anyone who owned the truck Johansson described, that he did not own a red hat, and that he did not leave his license inside the truck.

Gragg also denied being stopped or arrested by Johansson on August 3. Instead, he testified that he was arrested by another officer on August 3, and that he was not driving the truck at that time.

To rebut this testimony, the State called Deputy David Pimentel of the Grays Harbor County Sheriff's Department Drug Task Force. Pimentel testified that he had contact with Gragg on August 3, when Gragg drove an older gray Ford pickup belonging to Alvin V. Nelson into the driveway of a house where a "red phosphorous clandestine methamphetamine lab" was located. RP(1/4/2005) at 93. Pimentel also testified that he issued a traffic citation to Gragg for driving the truck. Defense counsel did not object to this testimony.

In surrebuttal, Gragg admitted having contact with Pimentel on August 3, but he again denied he was driving the truck at the time:

> No, I wasn't. I was in the garage. Joseph Fuller was picked up by the sheriff's department because he had a meth lab in the back of his pickup, they arrested Joseph Fuller here, and Josh VanOrman because Josh was on bail and, you know, had something to do with his bail. They arrested me for driving on warrants I did not know I had.

RP(1/4/2005) at 97.

The jury found Gragg guilty of reckless driving and first degree driving while license suspended or revoked. He appeals.

DISCUSSION

I. Denial of Suppression Motion

Gragg argues that the trial court erred when it denied his suppression motion.[10] Specifically, he argues that the trial court erred in finding that (1) he knowingly and voluntarily waived his *Miranda* rights; and (2) Johnson consented to the officers' entry into the motel room and that the entry was lawful.

A. Standard of Review

In reviewing a denial of a motion to suppress, we determine whether the challenged findings of fact are supported by substantial evidence in the record and whether those findings support the court's conclusions of law. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (citing *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994)). We consider unchallenged findings as verities on appeal. *Hill*, 123 Wn.2d at 644. When reviewing the trial court's conclusions of law, we employ a de novo standard. *Mendez*, 137 Wn.2d at 214 (citing *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. *Mendez*, 137 Wn.2d at 214 (citing *Hill*, 123 Wn.2d at 644). However, credibility and weight determinations are left to the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

[10] Gragg also challenges the trial court's denial of the suppression motion in his PRP. His arguments in his PRP are identical to those raised by counsel on direct appeal; accordingly, we do not address them separately.

B. Credibility

Gragg first challenges the trial court's finding that Johansson's testimony was credible. Credibility determinations are for the trier of fact and are not subject to review. *Camarillo*, 115 Wn.2d at 71. Accordingly, this argument has no merit.

C. Waiver of *Miranda* Rights

To establish that Gragg waived his *Miranda* rights, the State had to show that he knowingly, voluntarily, and intelligently waived his right to remain silent. *State v. Terrovona*, 105 Wn.2d 632, 646-47, 716 P.2d 295 (1986). A valid waiver need not be express; a court may find implied waiver when the record shows that the defendant understood his rights and then either volunteered information or answered questions freely and voluntarily. *Terrovona*, 105 Wn.2d at 646-47 (citing *State v. Adams*, 76 Wn.2d 650, 670, 458 P.2d 558 (1969), *rev'd on other grounds*, 403 U.S. 947 (1971); *State v. Gross*, 23 Wn. App. 319, 324, 597 P.2d 894 (1979); *State v. Cashaw*, 4 Wn. App. 243, 251, 480 P.2d 528)). To determine whether the waiver was valid, we consider the "totality of the circumstances under which it was made." *State v. Aten*, 130 Wn.2d 640, 663-64, 927 P.2d 210 (1996).

Gragg does not argue that his statements were involuntary, coerced, or made under duress. Instead, he argues the trial court erred when it found that (1) he had a conversation with Johansson after he was handcuffed and placed in the patrol car, implying that he did not make the inculpatory statements at issue; and (2) Johansson advised him of his *Miranda* rights, implying that any subsequent waiver was not intelligent and knowing.

The record shows that although the parties disputed the precise nature of the conversation, both Johansson and Gragg testified that they conversed in the patrol car. Accordingly, the trial court did not err when it found that Gragg and Johansson conversed after Gragg was handcuffed and placed in the patrol car. Additionally, Johansson's testimony is sufficient to support a finding that Gragg made the alleged admissions.

Johansson's testimony also established that before Gragg made any of the statements at issue, Johansson had advised him of his *Miranda* rights and Gragg had acknowledged that he understood these rights. This testimony supports a finding that any subsequent waiver was knowing and intelligent. Accordingly, although we agree the trial court's findings are vague and conclusory, the record supports the conclusion that Gragg voluntarily waived his *Miranda* rights when he admitted to Johansson that he had been driving the truck on August 9.

D. Permissive Entry

1. Undisputed Facts 1 and 2

Gragg next challenges undisputed facts 1 and 2, arguing that the trial court erred when it found that while at the motel room door "the officers merely asked if 'Jodie Gragg was there'" and asserting that during their interaction with Johnson, "[t]he questioning was more in depth than the mere finding that it was 'a brief conversation.'" Suppl. Br. of Appellant at 5-6.

Although Gragg is correct that these two findings are cursory, there is substantial evidence in the record establishing that the officers asked Johnson whether Gragg was in the motel room and that they engaged in a brief conversation with Johnson. The fact these findings do not disclose the nature of the conversation the officers had with Johnson is immaterial because these findings only reflect the *undisputed* facts; the nature and content of the conversation were clearly

disputed facts.

2. Existence of Warrant and Probable Location

Gragg next challenges the portion of the findings stating that the officers were aware of an outstanding arrest warrant for Gragg and of his "probable location." Suppl. Br. at 6. Gragg also argues that because the State did not introduce the warrant at the trial or suppression hearing, it failed to show the arrest warrant existed and, thus, in order for the arrest to be valid Johansson had to have probable cause. Again, we disagree.

Johansson testified that immediately before contacting Gragg, the officers "had a confirmed warrant for his arrest" and that he had been "advised of a possible location [Gragg] may be at." RP(12/20/2004) at 4. This testimony is sufficient to support the trial court's finding that the officers were aware of Gragg's "probable location" when they attempted to contact him at the motel room. Additionally, although a copy of the warrant would have been stronger evidence that a warrant existed, the trial court was entitled to believe Johansson's testimony and this testimony supports its finding that the officers were aware of an outstanding warrant before contacting Gragg at the motel room. Because Johansson's testimony was sufficient to establish that the warrant existed and that Johansson arrested Gragg on the warrant, we do not reach Gragg's probable cause arguments.

3. Consent

Gragg next argues that the portion of the findings stating that the officers "gained lawful entry by permission of one of the tenants" is not supported by the evidence. Suppl. Br. of Appellant at 5-6; Br. of Appellant at 33. He also challenges conclusion of law 2, which states that the officers' entry into the motel room was lawful.

By finding that the officers "gained lawful entry by permission of one of the tenants," the trial court implicitly found that Johnson freely and voluntarily consented to the entry. *See State v. O'Neill*, 148 Wn.2d 564, 588, 62 P.3d 489 (2003) (for consent to be valid, it must be freely given and voluntary) (citing *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968), *not followed on other grounds by State v. Guloy*, 104 Wn.2d 412 (1985), *cert. denied*, 475 U.S. 1020 (1986); *State v. Walker*, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998)). We note that the trial court's findings do not include any detailed factual findings addressing what aspects of Johnson's actions amounted to consent or whether that consent was free and voluntary.

Gragg argues that the trial court erred in finding that Johnson consented to the entry by merely stepping aside.[11] "If a householder is in a position to communicate refusal of admittance, and circumstances surrounding the warrantless entry 'are such that [police officers] can reasonably conclude [they are] not being refused entry, then no invitation, express or implied, is necessary to make the [officers'] entry lawful.'" *State v. Raines*, 55 Wn. App. 459, 462, 778 P.2d 538 (1989) (quoting *State v. Sabbot*, 16 Wn. App. 929, 937-38, 561 P.2d 212 (1977)), *review denied*, 113 Wn.2d 1036 (1990)). The record shows that Johnson was in a position to object to the entry but that she stepped aside and allowed the officer to enter without comment. Given that she had previously objected to the entry and blocked their way, by stepping aside the officers could have reasonably believed Johnson was now consenting to their entry. Accordingly, the trial court did not err to the extent it found that Johnson's actions amounted to implied consent. This

[11] Gragg also argues that the record does not establish that Johnson stepped aside. Although Johnson testified at the hearing that she did not move aside, Johansson testified that she did. The trial court found Johansson's testimony more credible and, as discussed above, we will not review this credibility determination. *Camarillo*, 115 Wn.2d at 71.

does not, however, resolve the issue of whether this implied consent was voluntary.

Our Supreme Court "has noted that 'consent' granted '*only* in submission to a claim of lawful authority' is not given voluntarily." *O'Neill*, 148 Wn.2d at 589 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 233, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)). By announcing that they had an arrest warrant for Gragg, Johansson implied that the officers had the authority to enter the motel room with or without Johnson's permission. The fact Johnson initially refused consent and stepped aside only after learning of the arrest warrant, supports the conclusion that she viewed this as a statement of authority. Given these facts, we conclude that to the extent the trial court found Johnson's permissive actions to be free and voluntary, the record does not support these findings. Furthermore, because the record does not support these findings, the trial court's conclusion that this was a lawful consensual entry was error.

4. Valid Entry to Execute Arrest Warrant

Despite concluding that the trial court erred in finding that Johnson voluntarily consented to the entry, we may still affirm the trial court's denial of Gragg's suppression motion on any ground supported by the record. *See State v. Carter*, 74 Wn. App. 320, 324 n 2, 875 P.2d 1 (1994) (citing *State v. Grundy*, 25 Wn. App. 411, 415-16, 607 P.2d 1235 (1980), *aff'd on other grounds*, 127 Wn.2d 836 (1995)). The record shows that the officers entered the motel room to execute an arrest warrant. A valid arrest warrant implicitly carries with it the limited authority to enter a dwelling in which the suspect lives if the officers have reason to believe the suspect is within.[12] *State v. Williams*, 142 Wn.2d 17, 24, 11 P.3d 714 (2000) (citing *Payton v. New York*,

[12] Gragg did not argue below or on appeal that he was not residing in the motel room. Additionally, apart from asserting that the record did not support the trial court's conclusion that the officers were aware of his probable location, an issue we reject above, Gragg does not assert that the officers did not have a reasonable belief that he was in the motel room when they arrived

445 U.S. 573, 603, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980)). Other than arguing that the State did not prove a warrant existed, an issue we reject above, Gragg does not claim that the warrant was not a valid warrant. He does, however, argue that the entry was unlawful because the officers did not comply with RCW 10.31.040.

RCW 10.31.040 provides: "To make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building, or any other inclosure, if, after notice of his office and purpose, he be refused admittance." This statute applies to all nonconsensual entries by law enforcement, not just those that involve the use of force. *State v. Myers*, 102 Wn.2d 548, 552, 689 P.2d 38 (1984) (citing *State v. Coyle*, 95 Wn.2d 1, 5, 621 P.2d 1256 (1980)). Gragg argues that the officers failed to comply with RCW 10.31.040 because they (1) "did not wait a reasonable time after knocking before forcibly entering the motel room"; and (2) "did not immediately announce their purpose." Br. of Appellant at 30.

Gragg's arguments fail because the officers' entry was consensual for purposes of RCW 10.31.040 and RCW 10.31.040 does not apply to consensual entries. *State v. Sturgeon*, 46 Wn. App. 181, 182-83, 730 P.2d 93 (1986) (citing *United States v. Salgado*, 347 F.2d 216, 217 (2d Cir.), *cert. denied*, 382 U.S. 870, 86 S. Ct. 146, 15 L. Ed. 2d. 109 (1965); *State v. Hartnell*, 15 Wn. App. 410, 418, 550 P.2d 63 (1976)). After the officers informed Johnson that they had a warrant for Gragg,[13] she stepped aside and allowed them to enter without comment. As discussed above, Johnson's act of stepping aside and allowing the officers to enter without comment after

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at the motel.

[13] Because the officers told Johnson about the warrant before entering, the fact they initially told her that they just wanted to talk to Gragg is irrelevant to this issue.

initially refusing entry, constitutes consent.[14] Because the officers entered with consent, RCW 10.31.040 does not apply.

Because RCW 10.31.040 does not apply, the officers properly entered the motel room to execute the arrest warrant, and the trial court did not err in denying Gragg's suppression motion.

II. Sufficiency

Gragg next argues that the evidence was not sufficient to establish that he was the person driving the white truck on August 9.[15]

In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State and ask whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), *aff'd*, 145 Wn.2d 352 (2002). Circumstantial and direct evidence are equally reliable, *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980), and we do not review issues of credibility and weight made by the trier of fact. *Camarillo*, 115 Wn.2d at 71.

Taking the evidence in the light most favorable to the State, the evidence that Gragg drove the truck on August 9, was: (1) Gragg's admission to Johansson on August 19; and (2) Johansson's testimony that it was the same truck he had seen Gragg driving previously, that it

[14] Although, as discussed above, this consent was not "voluntary" for the purpose of determining whether the officers entered with valid permission because the officers claimed authority to enter, it is unreasonable to judge the validity of consent given when examining RCW 10.31.040 by that same standard because RCW 10.31.040 *requires* that the officers have the authority to enter with or without permission and that they inform the person capable of consenting to their entry of their purpose. *See also Sabbath v. United States*, 391 U.S. 585, 589, 88 S. Ct. 1755, 20 L. Ed. 2d 828 (1968) (announcement requirement in similar federal statute reflects common law recognition that notice of authority to enter is required prior to invading the privacy of a person's home).

[15] Gragg raises this same argument in his PRP. Because his PRP argument is identical to that raised by counsel on direct appeal, we do not address it separately.

appeared to be Gragg from the back, that he found Gragg's identification inside the truck, and that Hake believed it was Gragg although he was not 100 percent sure. This evidence is sufficient to allow a rational trier of fact to find beyond a reasonable doubt that Gragg was driving the truck on August 9. To the extent Gragg is arguing that the evidence he presented was more persuasive, that is an issue of weight and credibility that this court will not review. *Camarillo*, 115 Wn.2d at 71. Accordingly, this argument also fails.

III. Ineffective Assistance of Counsel

Gragg next argues that his trial counsel's representation was ineffective because defense counsel failed to object or request a curative instruction when Pimentel's testimony placed Gragg at the scene of a suspected clandestine methamphetamine laboratory. We disagree.

To establish ineffective assistance of counsel, Gragg must show that his counsel's failure to object or offer a curative instruction amounted to deficient performance and that but for this error the result of the trial would have been different. *State v. Townsend*, 142 Wn.2d 838, 843, 15 P.3d 145 (2001) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086, *cert. denied*, 506 U.S. 958 (1992)). Given that the jury heard about Gragg's potential relationship to drug operations from two other sources and the fact his current charges were not drug related, we hold that Pimentel's brief mention of drug activity was harmless. Accordingly, Gragg cannot establish ineffective assistance of counsel on this basis.

IV. Prosecutorial Misconduct

In his SAG, Gragg further argues that Pimentel's testimony about the clandestine lab demonstrates that the prosecutor failed to prepare the witness to prevent him from making "extra judicial statements" and establishes a violation of Rule of Professional Conduct (RPC) 3.8.[16] SAG Additional Ground 4. Gragg misconstrues the meaning of "extrajudicial statements." Such statements are statements made outside the proceedings, not testimony during a trial, and RPC 3.8 does not apply here.

Additionally, to the extent we can construe this argument as a prosecutorial misconduct argument, there is nothing in the record regarding how the prosecutor prepared Pimentel. Furthermore, we have already determined that this testimony was harmless. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997) (to establish prosecutorial misconduct, the defense must establish both misconduct and prejudice) (citing *State v. Russell*, 125 Wn. 2d 24, 85, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S. Ct. 2003, 131 L. Ed. 2d 1003 (1995)), *cert. denied*, 523 U.S. 1007 (1998). Accordingly, Gragg is not entitled to relief on this basis.

V. Additional SAG Issues

In his SAG, Gragg argues that he is entitled to relief because the State failed to respond to his PRP. SAG Additional Ground 1. Gragg's PRP arguments were identical to those raised in his direct appeal, and we consolidated the PRP and direct appeal. The State responded to the issues in the PRP by way of its response to the direct appeal. Accordingly, this argument is clearly

[16] RPC 3.8(e) provides: "The prosecutor in a criminal case shall: . . . Exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case form making an extrajudicial statement that the prosecutor would be prohibited from making under rule 3.6."

without merit.

Attaching an unsigned copy of his trial counsel's December 21 memorandum in support of the motion to suppress, Gragg next appears to argue that the trial court was required to grant his suppression motion because the State did not file a response to this memorandum. SAG Additional Ground 2. Although the clerk's papers provided on appeal do not contain the filings related to suppression issues, the suppression hearing itself clearly demonstrates that the State opposed Gragg's suppression motion, and this argument is clearly without merit.

Gragg next argues that his arrest was in violation of RCW 10.31.100, because the officers lacked probable cause. SAG Additional Ground 3. This argument is only relevant if the officers did not enter the motel room to execute the arrest warrant and, instead, arrested him based on the August 9 eluding incident. Because we conclude above that the officers' entry and Gragg's arrest were based on an arrest warrant, this argument has no merit.

VI. Cumulative Error

Finally, Gragg argues he is entitled to relief under the cumulative error doctrine. Cumulative error occurs when errors that do not warrant reversal individually accumulate to produce a fundamentally unfair trial. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994) (citing *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir.), *cert. denied*, 464 U.S. 962 (1983)), *cert. denied*, 513 U.S. 849 (1994). The only potential error Gragg has shown was his counsel's failure to object to Pimentel's testimony, and we have determined that if this was error it was harmless. Accordingly, Gragg does not show cumulative error.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

PENOYAR, J.

We concur:

BRIDGEWATER, J.

HUNT, J.